United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1766

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1766

BETTY MARKOWITZ, WALTER MARKOWITZ, and CHARLES MARKOWITZ, on behalf of themselves and their sister, ESTELLE POSNER,

Plaintiffs-Appellants,

-against-

ABE IRVINE, individually and as Commissioner of the New York State Department of Social Services,

Defendant-Appellee.

APPELLANTS' BRIEF

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DECISION BELOW

The decision below was rendered by Inzer B. Wyatt, D.J., S.D.N.Y.

QUESTIONS PRESENTED

Where a Civil Rights Act suit was filed in order to reunite a family, insure due process in a state-administered Federal Medical Assistance Program, and to insure payment pursuant to Federal Statutes and Regulations:

(1) Could the District Court deny its jurisdiction under 28 USC 1343 to enforce Federal and Constitutional rights?

(2) Could the District Court deny its jurisdiction under 28 USC 1331 and 1337?

(3) Could the District Court claim the matter was for State or administrative remedies?

STATEMENT OF THE CASE

This case is an appeal from a dismissal of a Civil Rights Act law suit. The law suit developed from the following facts:

Appellant Estelle Posner, who suffers from hardening of the arteries, has been a resident of the Masonic Home in Utica, New York, from August, 1971, to the present date. The Masonic Home in Utica is licensed by the State Department of Social Services as a Senior Citizen Health Facility (a category of intermediate care facility), which provides only custodial care. It is not a nursing home or hospital. The arrangements regarding the placement of appellant Posner in the Masonic Home were handled by the appellant's husband. It was understood by the appellant at the time of her placement in the Masonic Home that she would receive necessary medical treatment for her condition. However, from August, 1971, until the present date, the appellant has never received medical treatment, and her condition has greatly deteriorated.

Application for Medicaid was made on appellant Posner's behalf, by her brothers, appellants Walter and Charles Markowitz, to the Oneida County Department of Social Services in Utica, New York, on March 7, 1973. Provision of Medicaid benefits to the appellant would enable her to return to New York City, where she could receive proper medical treatment and be reunited with her family. On April 18, 1973, the Oneida County Department of Social Services denied appellant Posner's application. A fair hearing was requested, and it was held, on

appellant's behalf, on November 1, 1973 (after the minutes of a previous hearing on the denial had been lost by the Welfare Department). On December 17, 1973, an adverse decision was rendered by the appellee based on the grounds that the appellant's husband was the only person qualified to make the application on her behalf, that the appellant's full needs were being met in the Masonic Home, and that Oneida County was not the public welfare district responsible for providing medical assistance to the appellant.

During the period that appellant Posner has been confined in the Masonic Home in Utica, her brothers, appellants Walter and Charles Markowitz, and her mother, appellant Betty Markowitz, have visited her regularly, approximately every other week. These trips from New York to Utica, a distance of over 200 miles, were made at great expense and inconvenience to appellants Walter, Charles, and Betty Markowitz. Appellant Posner's mental and physical health have greatly deteriorated during the period of her confinement in the Masonic Home. (See hearing 93a) At present, she is unable to communicate effectively or to do simple physical acts such as writing her name.

On May 6, 1974, the appellants commenced this action in the United States District Court for the Southern District of New York against Abe Lavine, the Commissioner of the New York State Department of Social Services, challenging the latter's denial of appellant Posner's application for medical assistance on the grounds that the denial violated appellant Posner's constitutionally guaranteed rights to treatment, travel, due

process and family association; that the denial violated appellants Walter and Charles Markowitz' constitutionally guaranteed rights of family association and due process; and that the denial violated appellant Betty Markowitz' constitutionally guaranteed rights of family association and parentage. Additionally, the appellants claimed that the denial of medical assistance to appellant Posner violated federal and state statutes and regulations. The appellants sought declaratory and injunctive relief, and damages. (See Complaint 13a)

On May 14, 1974, the appellants moved for a preliminary injunction. On June 10, 1974, Judge Inzer B. Wyatt denied this motion and on his own motion dismissed this action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted.

POINT I - THE DISTRICT COURT HAS JURISDICTION OF THIS CASE UNDER 28 USC §1343(3).

The Court below stated "there is no jurisdiction under 28 USC 1343(3) because no substantial constitutional claim is advanced" [emphasis added] (27a). This case, however, involves two sets of plaintiffs with a plethora of constitutional claims. Estelle Posner is being deprived of her freedom to travel and her right to treatment; her family, their familial and associational rights (and her mother, in addition, her parental rights). The State, on the other hand, has violated, not only constitutional rights, but also federal statutes which also predicates jurisdiction. No discussion of this point was offered below although all were pled and urged (1a). The Court below is clearly wrong.

This Court has found jurisdiction under §1343(3), that "so long as a colorable constitutional claim has been raised, jurisdiction will properly lie." Johnson v. Harder, 438 F.2d 7, 12 (2d Cir. 1971). In Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972), this Court upheld jurisdiction under §1343(3) of a due process challenge to the validity of a regulation promulgated by the New York State Department of Social Services, without explicitly discussing whether the constitutional claim was colorable or substantial. Several constitutional and federal claims have been advanced. All of them have received substantial recognition in other cases. Here the facts cry for relief, and, as we will demonstrate, the Constitution and applicable law mandate that relief. See also Carter v. Stanton, 405 U.S. 669 (1972); McNeese v. Board of Education, 373 U.S. 668 (1963);

Monroe v. Pape, 365 U.S. 167 (1961).

> For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra, 365 U.S., at 171-187, 81 S. Ct., at 475-484. Such claims are entitled to be adjudicated in the federal courts. McNeese supra, at 674.

This jurisdiction, because of the unfortunate situation in a region with great welfare problems and population, is very familiar with this type of suit and, as a result, the problems of welfare bureaucracy and its violations of law. See, e.g., Almenares v. Wyman, 334 F.Supp. 512, aff'd as modified, 453 F.2d 1075 cert. denied, 405 U.S. 944 (1972). Some cases (such as Almenares) may appear to involve Federal Courts in welfare administration but this jurisdiction has always acquitted its duty to preserve Federal and constitutional rights. Here, the constitutional questions are central and clear - and if the agency followed the law, the rights would be protected. Jurisdiction clearly obtains and the District Court must act to protect those rights.

POINT II - THE DISTRICT COURT HAS JURISDICTION OF THIS CASE UNDER 28 USC §1331.

The appellee has, by denying medical assistance to appellant Posner, violated 42 U.S.C. §1396a(a)(8), that provision of Title XIX of the Social Security Act which provides that assistance shall be furnished with reasonable promptness to all eligible individuals. By ruling that New York City rather than Oneida County was the public welfare district responsible for appellant Posner's care, the appellee has also misinterpreted the scope of the mandate of 42 U.S.C. §1396a(a)(1) and 42 U.S.C. §1396a(a)(5), which provide that a state plan for medical assistance must be in effect in all political subdivisions of the state and that the plan must be administered by a single state agency. These violations of the appellants' federal constitutional and statutory rights clearly provide the District Court with jurisdiction of this case pursuant to 28 U.S.C. §1331.

The federal question jurisdictional test was definitively stated in Bell v. Hood, 327 U.S. 678, 682 (1946). The Court held that where a complaint in a federal court is so drawn as to seek recovery directly under the Constitution or laws of the United States, and the jurisdictional amount is present, the court must entertain the suit, except: (a) where the alleged claim appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (b) where it is wholly insubstantial and frivolous. Obviously, neither of these two exceptions apply. The rationale of that case indicated that wherever possible, federal jurisdiction should be found to protect federal rights.

The $10,000 jurisdictional requirement of $1331 is met in this case. In the first place, dismissal for lack of jurisdiction is inappropriate unless it appears to a legal certainty that less than $10,000 is at issue. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

Appellant Posner is applying for medical assistance. In this era of medical costs, treatment of hardening of the arteries, and the treatment now necessary to attempt to restore her from the state to which she has deteriorated, may exceed the $10,000 limit in a matter of months.

But not only will costs consume the amount, but also where fundamental constitutional rights are involved, as in the present case, those rights are "almost by definition, worth more than $10,000." CCCO - Western Region v. Fellows, 359 F.Supp. 644, 647 (N.D. Cal. 1972). See also Cortright v. Resor, 325 F.Supp. 797, 810 (E.D.N.Y. 1971), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). Also, the courts, in determining whether $10,000 is at stake, must consider the potential ramifications, both direct and indirect, to plaintiffs. See, generally, Carlson v. Schlesinger, 364 F.Supp. 626 (D.D.C. 1973), concerning blight of military records, effect on future employment, arrest and detention; and Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970), concerning effect on future earning capacity.

Appellant Posner is being deprived of her right to medical treatment. This deprivation has caused serious deterioration of both her physical and mental health and will continue to do so. She and the other appellants are also being deprived by the

appellee's decision of their right as a family to be together, a fundamental constitutional right which is "almost by definition, worth more than $10,000." See CCO - Western Region v. Fellows and Cortright v. Resor, supra.

POINT III - THE ABSTENTION DOCTRINE DOES NOT APPLY TO THIS CASE.

Judge Wyatt stated, "Moreover there has been no exhaustion of State administrative and judicial remedies" (27a) and even suggested another "fair" hearing as available in New York City. But, the Supreme Court has consistently held that abstention is a judge-made doctrine that sanctions escape from immediate decision only in narrowly limited special circumstances, justifying the delay and expense to which application of the abstention doctrine inevitably gives rise. Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509 (1972); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 418 (1964).

In particular, suits brought pursuant to 42 U.S.C. §1983, do not require exhaustion of state administrative remedies. The Supreme Court has stated that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." McNeese v. Board of Education, supra, at 671. See also Carter v. Stanton, supra, at 671; Damico v. California, 389 U.S. 416, 417 (1967) (1983 suit requires no exhaustion and can be brought even after a state suit on the same question has been filed). Monroe v. Pape, supra, at 183: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[1]

[1] It should be noted in passing that to request another fair hearing, as the court below suggests, would be futile because the appellee has already ruled that appellant Posner's full needs are being met in the Masonic Home and that her brothers lack standing to request a hearing on her behalf. Apart from being futile, the resort to further state administrative procedures would naturally involve great expense and delay, while appellant Posner's health continues to deteriorate.

The present case deals primarily with the interpretation of a federal statute, 42 US.C. 1396 et seq., and the denial of federal constitutional rights. The state law issues are secondary and pendent. In actions brought pursuant to 42 U.S.C. §1983, as this one is, there is a special duty upon federal courts to exercise their jurisdiction because abstention is least appropriate where federal civil rights are in jeopardy. Holmes v. New York City Housing Authority, 398 F.2d 262, 265-266 (2d Cir. 1968); Bond v. Dentzer, 362 F.Supp. 1373, 1381 (N.D. N.Y. 1973).

The fact that appellant Posner has an Article 78 action, similar to the present one, pending in the New York County Supreme Court is not relevant so far as the abstention issue is concerned. It was brought and specifically so labeled to prevent an expiration of the Statute of Limitations should it occur that that proceeding was the only available remedy left. Where jurisdiction is proper in both state and federal courts, it is the duty of both to address the complaint. McNeese v. Board of Education, supra, at 672; Bond v. Dentzer, supra, at 1381.

POINT IV - THE APPELLEE HAS DENIED APPELLANT POSNER HER CONSTITUTIONALLY PROTECTED RIGHT TO TRAVEL WHICH SHOULD BE PROTECTED BY FEDERAL COURTS.

The right to travel is constitutionally protected, United States v. Guest, 383 U.S. 745 (1965). The case that clearly prohibited denial of benefits to people who choose to travel is Shapiro v. Thompson, 394 U.S. 618 (1969). See also Apthecker v. Secretary of State, 378 U.S. 500 (1963); Griffin v. School Board, 377 U.S. 218 (1964); Kent v. Dulles, 357 U.S. 116 (1958); Zemmel v. Rusk, 381 U.S. 1 (1965); Edwards v. United States, 314 U. S. 116 (1941); Chy Lung v. Freedman, 92 U.S. 275 (1875). Yet, appellant Posner was denied medical benefits because she traveled to reside in Utica and applied there; yet, appellant Posner was denied medical benefits because she wants to use them to leave the Masonic Home and travel to New York City, and their absence prevents her from doing so. Such denial, to punish and prevent travel, is clearly prohibited by the cases cited.

To deny medical benefits in order to prevent travel from the Masonic Home is, therefore, unconstitutional. The applicable statutory authority, §249.11 of Title 45 of the Code of Federal Regulations, provides for free choice of medical providers. Thus, the state cannot insist, as they have here, that appellant Posner not move but stay to "utilize" the Masonic Home (which affords no treatment).

POINT V - THE APPELLEE HAS DENIED APPELLANT POSNER HER CONSTITUTIONALLY PROTECTED RIGHT TO TREATMENT WHICH SHOULD BE PROTECTED BY FEDERAL COURTS.

The right to treatment has been established in New York State. The two leading cases which so establish this right are Martarella v. Kelly, 349 F. Supp. 575 (S.D. N.Y. 1972) and New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1973).

The right to treatment was first developed in the District of Columbia, and has been expanded and fleshed out in the following cases: the seminal case, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Ragsdale v. Overhauser, 281 F.2d 942 (D.C. Cir. 1960); Darnell v. Cameron, 348 F.2d 64 (D.C. Cir. 1965). The right was extended to juveniles in In Re Jessie Gene Elmore, 383 F.2d 125 (D.C. Cir. 1967).

Other jurisdictions besides New York and the District of Columbia have recognized the right to treatment. See, for example, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D. R.I. 1972); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1973); Collins v. Bensinger, 374 F. Supp. 273 (N.D. Ill. 1974); Donaldson v. O'Connor, 42 U.S.L.W. 2577, 73/1843 (5th Cir. April 26, 1974). See footnote 12 of Donaldson v. O'Connor, supra, for a summary of the scholarly literature on the right to treatment, including the Symposiums in 57 Georgetown Law Journal and in 67 U. Chi. L. Rev. No. 4. See for a summary of other relevant New York State cases, Martarella v. Kelly, supra, at 600.

Appellant Posner is being kept as if she were being kept stored in a warehouse. Her condition has deteriorated. She is not presently receiving treatment, nor did she ever receive treatment to prevent this deterioration. Appellant Posner has a right to treatment, as the above cases held. To deny her medical assistance prevents her from receiving this treatment. She must receive her required treatment, and medical assistance must be provided to enable her to do so.

POINT VI - THE APPELLEE HAS DENIED APPELLANT POSNER HER CONSTITUTIONALLY PROTECTED RIGHT TO DUE PROCESS OF LAW.

By holding that her family could not speak, apply, or appeal for her, the totally incapacitated appellant (66a) is prevented from having her entitlement ever adjudicated. Placed in a ward that led to a deterioration so she cannot speak up for her rights, the state now holds no one can try to get those rights for her. Once reduced to incapacity, the state prevents her chance to recover. Such a position clearly violates her rights to due process. It also, of course, as discussed infra, violates the applicable statutes and as such violates due process.

Further, by deciding that appellant Posner's medical needs were being met in the Masonic Home in the absence of any evidence in the record of the "fair" hearing to that effect, appellee Lavine violated the due process clause of the Fourteenth Amendment. It is clearly established that an administrative decision for which a hearing is a pre-requisite must be supported by some evidence in the record in order to satisfy the requirements of due process. Rosenbluth v. Finkelstein, 300 N.Y. 402, 91 N.E.2d 581 (1950); Stammer v. University of State of New York, 287 N.Y. 359, 39 N.E.2d 913 (1942). The "fair" hearing conducted in the present case was mandated by §366-a(4) of the New York Social Services Law at the request of the appellants. Upon such request, the appellee was obliged to conduct the hearing and observe due process requirements in so doing.

Not only was there no evidence in the record of the hearing to the effect that appellant Posner's full medical

needs were being met in the Masonic Home, but it was impossible for such evidence to have been introduced because no representative of the Oneida County Department of Social Services, which denied the application for medical assistance originally, was present at the hearing. Yet, such data was essential for the determination. This unsupported decision constitutes a denial of due process.

It goes without saying that the brothers and mother Markowitz are denied due process by being denied all forums. Their rights and needs are crucial and the Constitution as well as common sense mandates they be heard and the wrongs done to them rectified. Every appellant has been denied due process.

POINT VII - THE APPELLEE HAS DENIED THE APPELLANTS THEIR CONSTITUTIONALLY PROTECTED RIGHT TO BE TOGETHER AS A FAMILY.

The fundamental right to maintain the family unit has long been recognized in American Constitutional Law. See Meyers v. Nebraska, 262 U.S. 390 (1922); West Virginia v. Barnette, 319 U.S. 624 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Farmington v. Tokushige, 273 U.S. 284 (1927). More recently, in Yoder v. Wisconsin, 402 U.S. 994 (1972), the Supreme Court made it clear that the value of a family unit is so strong that it can even take precedence over State statutory requirements. In that case, Amish children were not required to go to school because of their parents' religious precepts, in spite of the requirements of the Public Education Law.

In the present case, the appellants want to be reunited in New York City, and medical assistance for appellant Posner is necessary for that purpose. As there is no law preventing the family unit from staying intact as there was in Yoder v. Wisconsin, supra, (where the Public Education Law ordered the children out of the home and into the schools) a fortiori, the Constitution also compels that this family not be rendered and maintained asunder, against all their wishes. See also, for procedural safeguards reflecting the constitutional sanctity of the family unit, Armstrong v. Manzo, 380 U.S. 545 (1965), and Stanley v. Illinois, 405 U.S. 645 (1972). Appellant Posner wants to be back with her mother and brothers. The mother and brothers want appellant Posner in New York City

receiving medical treatment and living with them. Medical assistance is necessary and required by the Constitution for this purpose.

POINT VIII - MRS. MARKOWITZ HAS A CONSTITUTIONAL RIGHT TO HAVE HER CHILD WITH HER.

Parental rights are "far more precious than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). See also dicta in Prince v. Massachusetts, 321 U.S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child resides first in the parents." See also Kestenberg: Separation from Parents: J. Nervous Child, 20 (1943); Cahn, Child Welfare - Trends and Directions; 41 Child Welfare 459 (1962). See, in general, the cases cited in Point VII, supra.

Mrs. Markowitz, mother of appellant Posner, is a woman of advanced years. Regularly she visits her daughter. At least one of Mrs. Markowitz' two sons travels with her to Utica, New York. The physical effects of the travel are devastating to Mrs. Markowitz. The psychological effects of seeing her child's condition deteriorate without treatment are appalling. Appellant Posner, due to lack of medical treatment, has degenerated to where she is, in practical and physical nature, a helpless infant. Prevented from seeing her child properly cared for, the mother now wants to have her child returned to her in New York, with the hope of obtaining the required medical treatment. The Constitution and the above cases affirm Mrs. Markowitz' right to have her child returned to her.

POINT IX - FEDERAL AND STATE STATUTES AND STATE REGULATIONS REQUIRE THAT APPELLANT POSNER BE GIVEN MEDICAL ASSISTANCE.

Appellee Lavine violated state and federal statutes in determining that New York City rather than Oneida County is the public welfare district responsible for appellant Posner's care. At the time of appellant Posner's application to the Oneida County Department of Social Services for medical assistance, §62.5(d) of the Social Services Law provided:

> When a person, either upon admission to a hospital or nursing home located in a public welfare district other than the district in which he was then residing, or while in such hospital or nursing home, is or becomes in need of medical assistance, the public welfare district from which he was admitted to such hospital or nursing home shall be responsible for providing such medical assistance for so long as such person is eligible therefor.

Because appellant Posner was in the Masonic Home, which is not licensed by the State of New York as a hospital or nursing home, at the time of her application to the Oneida County Department of Social Services, Oneida County was and is responsible for providing medical assistance to her.

Title XIX of the Social Security Law, 42 U.S.C. §1396 et seq., provides that a state plan for medical assistance must be in effect in all political subdivisions of the state and that the plan must be administered by a single state agency. 42 U.S.C. §§1396a(a)(1), (5). The New York State Social Services Law, §363 provides that:

> ...a comprehensive program of medical

> assistance for needy persons is hereby established to operate in a manner which will assure a uniform high standard of medical assistance throughout the state. In carrying out this program, every effort shall be made to promote maximum public awareness of the availability of, and procedure for obtaining such assistance, and to facilitate the application for and the provision of such medical assistance.

Such statutes indicate the state-wide nature of the medical assistance plan and its remedial nature. For both of these reasons, it is irrelevant for purposes of eligibility in which county appellant Posner applied for medical assistance.

In denying appellant Posner's brothers standing to request a fair hearing on her behalf, the appellee violated the Regulations of the Department of Social Services. Section 358.3 (c) of the Regulations provides that any applicant may be represented by legal counsel or by a relative, friend or other spokesman. Section 358.5(a) of the Regulations provides that:

> Any clear written or oral communication to the department by or on behalf of an applicant...requesting review of a social services official's decision, action or failure to act shall constitute a request for a fair hearing....[emphasis added]

Section 358.5(b) states the policy of the department that the freedom to make such a request must not be limited or interfered with in any way, and the emphasis must be on helping the appellant to submit and process his request and to prepare his case. Furthermore, §358.15(b) states: "An individual or organization...representing an appellant shall have an appropriate

written authorization, unless the condition of the appellant makes it impracticable for him to execute such authorization." Appellant Posner's physical and mental condition made it impossible for her to request the fair hearing herself or to authorize in writing her brothers to make the request on her behalf (66a). While her brothers and aged mother have exhibited great care and concern for her during the period of her confinement in Utica, traveling from New York City to Utica, at great expense, almost every other week for approximately three years, appellant Posner's husband has shown little or no concern for her during the period of her confinement. He has rarely, if ever, visited her, and contributes no money directly to her support.

The above cited Regulations of the Department of Social Services dictate a liberal policy of the department which necessarily allows relatives, friends, or other persons to represent an appellant in a fair hearing proceeding, recognizing the constitutional compulsion of due process to do so. Where the representative is in a close family relationship with the appellant and has shown a continuous concern for the welfare of the appellant, it is a particularly acute abuse of discretion and a contravention of department policy regulations, and state and federal constitutions, to refuse standing to such a representative.

Thus, it is clear that appellant Posner's application was appropriately made by her brothers and that she is entitled to medical assistance. All eligible individuals must be enrolled

and receive benefits with reasonable promptness. 42 U.S.C.§§426, 1395(c)(v) and in particular 1396a(a)(8). No one doubts, nor has it been contended, but that appellant Posner is financially eligible and without assets. Appellant Posner should receive her entitlement immediately.

CONCLUSION

For all of the foregoing reasons, the decision of the District Court must be reversed and the case remanded for injunctive relief.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETTY MARKOWITZ, WALTER MARKOWITZ, and CHARLES MARKOWITZ, on behalf of themselves and their sister, ESTELLE POSNER, Plaintiffs-Appellants,	
-against-	AFFIDAVIT OF SERVICE BY MAIL
ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,	Index No.
Defendant-Appellee	Docket No. 74-1766

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York.

That on the 20 day of September , 1974, deponent served the within 1 copy of JOINT APPENDIX and 2 copies of APPELLANTS' BRIEF

upon BURTON HERMAN, Esq., Assistant Attorney General of the State of New York, 2 World Trade Center, New York, New York 10047

the address designated by said attorney for that purpose by depositing a true copies of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Elizabeth Melendez
ELIZABETH MELENDEZ

Sworn to before me this
20 day of September 1974.

Jonathan A. Weiss
JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975